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SUPREME COURT, U.S.

No. 20

IN THE

Supreme Court of the United States

October Term, 1954

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

—against—

WILLIAM DIXON, *et al.*, as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

SUPPLEMENTAL BRIEF OF PETITIONER ON REARGUMENT

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Upon the original argument certain questions were raised that should be discussed in this supplemental brief.

(1)

Wherever a question has arisen about access to public property for the purpose of speech and assembly, there has been recognition of the distinction between the prim-

ary purpose of the facility and the secondary one of public assembly. In the case of streets, the primary use is that of movement of people and traffic. In the case of parks, it is that of recreation, health and esthetics. In the case of schools, the primary purpose is that of education. Therefore, there is nothing singular in the case of school buildings about the existence of a purpose prior to that of public assembly.

(2)

Such use of school buildings is provided by Section 414 of the Education Law of New York. The applicable subdivisions of that law are "1" and "3" and "Rules and Regulations for Use of School Buildings and Grounds" (Appendix C in Brief of Petitioner).

(3)

It was conceded by the respondents and the *amicus* on the argument that school buildings may be used for political speeches and political assemblies. It was admitted that in such case, under the statute and Rules, the respondents could grant the use to Republicans, but could refuse the use to Democrats. It was admitted in answer to the Chief Justice's question that a Peace Party (which would bear an infinity to petitioner) could be denied use under such application of the law and Rules.

(4)

This case primarily is governed by what was said and decided in the *Niemotko, Kunz* and *Feiner* cases. It is

especially related to the *Niemotko* case both procedurally and substantively.

In *Niemotko* the defendants were convicted for disorderly conduct by holding a religious meeting in a public park without a license. Although no ordinance regulated the use of the park, there was a custom to obtain permits from the Park Commissioner for its use for public meetings.

Permission for such use was refused to defendants. Subsequently, they filed a written request for future open dates. This request was refused. After the denial of the permit, the defendants held the meeting. They were thereupon arrested and convicted. It was decided by this Court: (1) This Court may review the decision even of the trial court, even though there was no prior review at an appellate level, when in fact a review was refused in the State court; (2) When a claim is made of a denial of rights under the Federal Constitution, this Court will review the evidentiary basis of the conclusions; (3) No standards existed for determining the limits of the discretion to be exercised by the public official. Therefore, a mode existed for censoring the speech in violation of the Constitution; (4) Woven into the fabric of this lack of standards was an obvious discrimination. *Nowhere in the record was there a ground given for the refusal of permission.* The instant case too, presents such lack of adequate reason for refusal, where others have been granted the use; (5) In *Niemotko* there was no showing of a systematic discrimination against Jehovah's Witnesses. This Court merely drew an inference that the discrimination was based on their views. In the instant case, too, the discrimination

can be inferred from the alleged views of the organization. Moreover, it was stated by both respondents and Special Term that the discrimination was on similar grounds (R. 17, top, and Respondent's Brief in Opposition to Writ of Certiorari p. 6).

(5)

It must be emphasized that it is the law of *this* case—as distinct from some hypothetical one, that the petitioner rightfully appealed to the courts, instead of appealing to the Commissioner of Education. It was so held by the court of final review in this case, 281 App. Div. 987, Case No. 4. This should have foreclosed any further discussion of that question. It should also have precluded any hypothetical problem as to what would have happened if a review had been sought from the Commissioner.

But to those interested to know what would have happened, reference is made to the case of *Matter of Mauersberger* cited on page 27 of the brief of *Amicus Curiae,* decided by the Commissioner of Education on May 2, 1935. It was there held, as respondents here have held, that unlimited discretion to grant the use rests with the Board of Education, and furthermore, that the organization dealt with "controversial" subjects was sufficient reason for refusal. Could a closer parallel exist? It is obvious that an appeal to the Commissioner would have been a futility.

As stated, the holding of the Appellate Division is the law of the case and is binding. True, its memorandum is terse, but it clearly holds that petitioner rightfully appealed to the courts, instead of proceeding for an adminis-

trative review by the Commissioner. But for those who would now question that holding of the Appellate Division in an attempt to prevent this court from deciding the important and recurrent problems of civil liberties involved in this case, it is respectfully submitted that the cases presented beginning at page 3 of Brief of Petitioner (citation of *Re Oliver*, 233 U. S. should be 333 U. S.) sustain the Appellate Division. The text of Section 310 and the cases hold (1) that the petitioner had the choice of either going to the Commissioner or to the courts; (2) if he had appealed to the Commissioner, he could not thereafter appeal to the courts. He could appeal to the courts whenever there was a claim of arbitrariness or of unconstitutionality. (*Sloat* v. *Board of Education*, 274 N. Y. 367 at 370 and 374 as to arbitrariness; Opinion Education Department 60 St. Dept. 17 as to constitutionality.) See *Slochower* v. *Board of Education*, in this Court, Docket No. 466, October Term, 1954, certiorari granted and awaiting argument. There, the petitioner also had a review granted in the courts relating to a Board of Education instead of pursuing an appeal to the Commissioner, same case, 306 N. Y. 532; 282 App. Div. 718. Cf. *Barsky* v. *Board of Regents*, 347 U. S. 442.

(6)

Some comment was made by respondent's counsel at the argument that the denia of leave to appeal by the Court of Appeals had some sig ificance with respect to the merits of this case. See *Niemot o* case, showing that there is none to be inferred. See also, *Marchant* v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284. In New York, an aggrieved

person may appeal either as a matter of right or by permission (New York Civil Practice Act, Section 588, subd. 1(a); Section 589, subds. 2 and 3). There is no generous provision of practice as exists in this court, that if review is mistakenly taken by appeal, the court may treat it as an application for a writ of certiorari. No inference can be drawn from the fact that resort was first made, as here, by application for leave to appeal. The use may depend upon experience of counsel or the judgment of the moment.

(7)

"Reply Brief of Petitioner" page 3 (to which reference is requested) has answered the questions raised by the *amicus* that an attack on the Rule 25 as distinct from its applications should have been appealed to the Commissioner. Furthermore, as Mr. Justice Frankfurter observed at the argument,—courts take judicial note of the Rule, and, therefore, it was before the Appellate Division.

There is no practical distinction between the Rule and its application by respondents in this case. The Rule states that the Board arrogates full discretion to itself. The Board, in applying the State statute, in this case contends that it has full discretion. It is, as if the Board in reply to the request of the petitioner had sent him a refusal with a copy of the text of Rule 25. There is no distinction between the text of the Rule and its application, both of which petitioner challenges here.

(8)

If the petitioner had appealed to the Commissioner then by reason of the text of Section 310. Education Law and by construction, *Chapin* v. *Board of Education*, 291 N. Y. 241, he would have been barred from appeal to the courts.

(9)

In any event, there is squarely before this Court the question of the application of the law to this petitioner. In this connection, it should be emphasized that there are two facets to the argument, (a) that there was censorship; and (b) related to censorship, as in *Niemotko*, is the question of discrimination. The allegation of censorship is found in paragraph 18 of the petition below (R. 12). The allegation of discrimination is found in paragraphs 15, 16 and 17 (R. 11). They allege that respondents refused to give a reason (see *Niemotko*, where the inference of discrimination was drawn from this fact). It further alleges discrimination (paragraph 15) that other organizations were permitted to use the school for purposes of assembly and discussion, whereas (paragraph 17) such permission was refused to petitioner. In the *Niemotko* case, it was not necessary to show a systematic exclusion. In that case, it was not necessary to show that the use was granted specifically to a religious group of Jehovah's Witnesses type, but was refused to the Jehovah's Witnesses. *Niemotko*, went further. It did not even require that it be shown that the park was used for religious assemblies. All it required to be shown is that others were permitted to use the park for public assembly, but Jehovah's

Witnesses were excluded. That is what petitioner alleges here.

In any event, this is a proceeding in which a pleading alone is involved. At a hearing, facts can be adduced to show what the plan of discrimination was. In connection with the other part this argument, to wit, censorship, it is admitted by the respondents that the reason the petitioner was rejected is that the organization is "controversial." What clearer analogy can there be to the *Niemotko* case?

(10)

In connection with these arguments, reference is made to the observation made in the *Cantwell* case (*Cantwell* v. *Connecticut*, 310 U. S. 296) at page 306, that the existence of a right of appeal to the courts to redress the censorship imposed does not save the law, if it has potentialities of restraining speech.

(11)

A further word is necessary to be added to what petitioner stated on page 5 of "Reply Brief of Petitioner". The *amicus* has urged that a decision be postponed until after the highest court in New York has construed this law. The *amicus* cited (p. 16) the case of *Federation of Labor* v. *McAdory*, 325 U. S. 450, for the proposition. The *amicus* also notes that the case was one for a declaratory judgment. An action for declaratory judgment however is one that is addressed to the discretion of the court. There is latitude for granting or withholding decision. Judgment in such a case can be refused. But this case

seeks a remedy for the enforcement of a right. The remedy cannot be postponed. This petitioner seeks relief now. It is his own constitutional right that is sought to be vindicated. It should be determined now. The New York Board of Education construed the law, the Attorney General of New York construed the law, the Supreme Court of New York construed the law, the Appellate Division construed the law. The Court of Appeals refused to act. The petitioner has exhausted all State remedies, and reached the end of road in his search for constitutional protection. Why should there be further delay to obtain a remedy for exercising the supposedly simple right to speak in public?

In all events,—and this submitted only as a last resort, that if word must come from the State court in clarification then *Musser* v. *Utah*, 333 U. S. 95 suggests that the case be returned for clarification.

(12)

It is a sufficient answer, however, which cannot be obscured by these last moment defenses, that the Appellate Division, the highest court, has ruled, as the law of this case, that resort to the Commissioner was not necessary. The case is therefore, free from State law questions, and is ripe for a decision on the important Federal attack.

Respectfully submitted,

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